STATE OF MICHIGAN

IN THE SUPREME COURT

NEXTEER AUTOMOTIVE CORPORATION, a Delaware corporation,

Plaintiff/Appellee,

v.

MANDO AMERICA CORPORATION, a Michigan corporation, TONY DODAK, ABRAHAM GEBREGERGIS, RAMAKRISHNAN RAJAVENKITASUBRAMONY, CHRISTIAN ROSS, KEVIN ROSS, TOMY SEBASTIAN, THEODORE G. SEEGER, TROY STRIETER, JEREMY J. WARMBIER, and SCOTT WENDLING, jointly and severally,

Defendants/Appellants,

And

CHRISTIAN ROSS, KEVIN ROSS, TOMY SEBASTIAN, THEODORE G. SEEGER and TONY DODAK,

Counter/Third-Party Plaintiffs,

v.

NEXTEER AUTOMOTIVE CORPORATION, A Delaware corporation, LAURENT BRESSON, and FRANK LUBISCHER,

Counter/Third-Party Defendants.

/

Supreme Court Case No. 153413

Court of Appeals No. 324463

Saginaw County Circuit Court Case No. 13-021401-CK
Hon. M. Randall Jurrens (P27637)

PLAINTIFF-APPELLEE NEXTEER AUTOMOTIVE CORPORATION'S ANSWER IN OPPOSITION TO DEFENDANTS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

Foley & Lardner LLP
John R. Trentacosta (P31856)
John F. Birmingham (P47150)
Scott T. Seabolt (P55890)
Counsel for Nexteer, Bresson and Lubischer
500 Woodward Ave,, Suite 2700
Detroit, MI 48226-3489
Telephone: (313) 234-7100

Shea Aiello & Doxsie PLLC
David J. Shea (P41399)
Attorneys for Dodak, C. Ross, K. Ross, Sebastian, and Seeger
26200 American Drive, Third Floor
Southfield, MI 48034
Telephone: (248) 354-0224

Plunkett Cooney, P.C.
Mary Massaron (P43885)
Counsel for Mando
38505 Woodward Ave., Suite 2000
Bloomfield Hills, MI 48304
Telephone: (313) 983-4801

Giarmarco Mullins & Horton PC
Andrew T. Baran (P31883)
William H. Horton (P31567)
Counsel for Mando
101 W. Big Beaver Road, Tenth Floor
Troy, MI 48084-5280
Telephone: (248) 457-7000

Braun Kendrick Finkbeiner PLC
C. Patrick Kaltenbach (P15666)
Attorneys for Gebregergis, Rajavenkitasubramony, Strieter, Warmbier, and Wending
4301 Fashion Square Blvd.
Saginaw, MI 48603
Telephone: (989) 498-2100

Cohen & Gresser LLP
By: Alexandra S. Wald
Mark D. Spatz
Sang Min Lee
Counsel for Mando
800 Third Ave., 21st Floor
New York, New York 10022
Telephone: (212) 682-9415

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

COUNTER STATEMENT OF QUESTIONS PRESENTED

1. WHETHER THIS COURT SHOULD GRANT DEFENDANTS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL WHEN THEY FAIL TO ESTABLISH ANY OF THE GROUNDS REQUIRED BY MCR 7.305(B).

   Defendants-Appellants answer: "Yes."

   Plaintiff-Appellee answers: "No."

   The Circuit Court answers: N/A

   The Court of Appeals answers: "No."

2. WHETHER THE COURT OF APPEALS COMMITTED "CLEAR ERROR" RESULTING IN "MATERIAL INJUSTICE" WHEN IT CONCLUDED THAT DEFENDANTS EXPRESSLY AGREED AND STIPULATED THAT THE ARBITRATION PROVISION WAS NOT APPLICABLE.

   Defendants-Appellants answer: "Yes."

   Plaintiff-Appellee answers: "No."

   The Circuit Court answers: "Yes."

   The Court of Appeals answers: "No."

3. WHETHER THE COURT OF APPEALS COMMITTED "CLEAR ERROR" RESULTING IN "MATERIAL INJUSTICE" WHEN IT CONCLUDED THAT THE EXPRESS WAIVER OF ANY RIGHT TO ARBITRATE DID NOT REQUIRE PREJUDICE.

   Defendants-Appellants answer: "Yes."

   Plaintiff-Appellee answers: "No."

   The Circuit Court answers: "Yes."

   The Court of Appeals answers: "No."

4. WHETHER THIS COURT SHOULD AFFIRM THE COURT OF APPEALS' DECISION ON THE ALTERNATIVE GROUNDS THAT NEXTEER NEVER AGREED TO ARBITRATE DISPUTES WITH ITS FORMER EMPLOYEES AND THAT, CONSISTENT WITH DEFENDANTS' STIPULATION IN THE CMO, NEXTEER'S CLAIMS ARE NOT WITHIN THE SCOPE OF THE NDA'S ARBITRATION PROVISION.

Defendants-Appellants answer:	"No."
Plaintiff-Appellee answers:	"Yes."
The Circuit Court answers:	"No."
The Court of Appeals answers:	N/A

I. INTRODUCTION

The Michigan Court of Appeals properly reversed the Circuit Court's order compelling arbitration based on Defendants' express waiver of any right to arbitration in the Case Management Order ("CMO"). To prevail at this stage, Defendants agree that they must establish "clear error" resulting in "material injustice" or that the "issue involves legal principles of major significance to the state's jurisprudence." Here, the Court of Appeals merely enforced Defendants' affirmation that the arbitration agreement was "not applicable", which was repeatedly ratified by Defendants' behavior over a period of several months including using judicial procedure to secure dismissal of the majority of Nexteer's claims. Holding Defendants to their representations, which were made part of a court order, does not constitute clear error and certainly does not result in material injustice. In fact, Defendants were right the first time that the arbitration agreement was "not applicable" and the Court of Appeals just confirmed same. Moreover, the application of an agreed-upon court order, which is issued and administered in every case, does not rise to the level of a legal principle of major significance to the state's jurisprudence. The majority of the arguments Defendants now rely on to attack the Court of Appeals' decision were already rejected by the Circuit Court (the same court that Defendants now want this Court to reinstate its prior decision). In fact, the Circuit Court referred to Defendants' arguments as "disingenuous." Moreover, Defendants fail to provide any case law to support their argument that the Court of Appeals was clearly erroneous in concluding that prejudice is not required when a party expressly (as opposed to impliedly) waives its right to arbitration.

Alternatively, even if the CMO was not an express waiver of Defendants' right to arbitration, which it clearly was, Defendants' affirmation that the arbitration provision was "not applicable" is correct substantively as Nexteer never agreed to arbitrate disputes with its former

employees. The Employment Agreements that are the basis for Nexteer's claims do not contain an arbitration provision. In order to apply the arbitration provision to Nexteer's claims, the Circuit Court had to re-write the arbitration provision, including adding parties and creating new rules out of whole cloth such as changing the forum for arbitration to Michigan instead of Switzerland. Additionally, Nexteer's claims are not within the scope of the NDA's arbitration provision. Nexteer's claims, including its claims against Mando, do not arise under, or relate to, the NDA. All of Nexteer's claims exist regardless of the NDA.

Thus, the Court of Appeals properly concluded that Nexteer should not be compelled into arbitration and this Court should deny Defendants' Application for Leave to Appeal.

II. COUNTER STATEMENT OF FACTS

A. Nexteer's Business

Headquartered in Saginaw, Michigan, Nexteer employs approximately 8,000 individuals and has over 50 global customers including General Motors, Ford, Chrysler, Fiat, Toyota, PSA Peugeot Citroen and manufacturers in India, China and South America. *See* First Amended Complaint, ¶17, attached as Exhibit A. Over the many decades of its existence, Nexteer and its predecessors have demonstrated innovation and excellence in the steering systems area, introducing advances into the marketplace such as Saginaw Safety Power Steering, the tilt-wheel steering column, and the anti-theft steering column, the rack and pinion steering system, and the Delphi Electronic Power Steering System. *Id*. at ¶22.

One of the keys to Nexteer's continuing success in selling its steering systems to automotive manufacturers is Nexteer's EPS System ("EPS"). *Id*. at ¶23. EPS is the result of decades of research, development and expenditure. *Id*. The system results in reduced gas emissions, better mileage, and quieter performance. *Id*. The power and brains of EPS is the Modular Power Pack ("MPP") which is a subsystem of the whole EPS product. *Id*. EPS and

MPP give Nexteer a competitive advantage over competing steering system manufacturers such as Defendant-Appellant Mando, allowing Nexteer to prosper. *Id*. at ¶24.

To protect these systems and other confidential information, Nexteer requires its employees to sign employment agreements in which employees acknowledge that they may become privy to trade secret and confidential and/or proprietary information, agree not to disclose any of the information to any person or entity, and admit that such disclosure could cause irreparable harm. *Id*. at ¶26. In addition, the employees agree that for a period of one year after they leave Nexteer's employ, they will not directly or indirectly induce any Nexteer employee to participate with the departed employee on any future business venture. *Id*.

B. Employment Of The Ten Former Employees

The ten key former employees (the "Former Employees") were all employed by Nexteer as engineers, were exposed to Nexteer's confidential information and trade secrets, and worked in key areas where they obtained knowledge and familiarity with Nexteer's EPS, MPP and/or other systems. *Id*. at ¶34. The Former Employees include:

- Kevin C. Ross ("K. Ross") – Hired on March 27, 1986, and resigned on September 5, 2013. At the time of his resignation, K. Ross was the Product Line Executive of Global Steering Systems and was one of Nexteer's foremost experts on Nexteer's EPS System and one of the designers of Nexteer's MPP. *Id*. at ¶¶35-37, 101.

- Tony Dodak ("Dodak") – Hired on June 16, 1994, and resigned on September 4, 2013. At the time of his resignation, Dodak was the Chief Product Engineer and was one of Nexteer's foremost experts on its EPS System, including MPP. *Id*. at ¶¶38-40, 101.

- Abraham Gebregergis ("Gebregergis") – Hired on January 2, 2008, and resigned on September 11, 2013. At the time of his resignation, Gebregergis was an Electrical Hardware and Electromagnetic Engineer and had access to Nexteer's proprietary and confidential information and trade secrets. *Id*. at ¶¶41-43, 101.

- Ramakrishnan Rajavenkitasubramony ("Rajavenkitasubramony") – Hired on December 17, 2007, and resigned on September 11, 2013. At the time of his resignation, Rajavenkitasubramony was a Motor Controls engineer working on

the Future Engineering team and had access to Nexteer's proprietary and confidential information and trade secrets. *Id*. at ¶¶44-46, 101.

- Christian Ross ("C. Ross") – Hired on December 9, 1990, and resigned on September 4, 2013. At the time of his resignation, C. Ross was the Staff Engineering Manager in charge of Future Engineering and was one of Nexteer's foremost experts on Nexteer's EPS System and one of the designers of Nexteer's MPP. *Id*. at ¶¶47-49, 101.

- Tomy Sebastian ("Sebastian") – Hired on January 6, 1992, and resigned on September 4, 2013. At the time of his resignation, Sebastian was an engineer and was the Electrical Hardware/Electrical Magnetics expert on the Future Engineering Team. *Id*. at ¶¶50-52, 101.

- Theodore G. Seeger ("Seeger") – Hired on June 17, 1968, and resigned on September 5, 2013. At the time of his resignation, Seeger was the Executive Director, Advanced Manufacturing Strategies and one of Nexteer's foremost experts on the EPS and MPP systems. *Id*. at ¶¶53-55, 101.

- Troy Strieter ("Strieter") – Hired on March 16, 1997, and resigned on September 12, 2013. At the time of his resignation, Strieter was an Engineering Manager and had access to Nexteer's proprietary and confidential information and trade secrets. *Id*. at ¶¶56-58, 101.

- Jeremy J. Warmbier ("Warmbier") – Hired on June 26, 2000, and resigned on September 13, 2013. At the time of his resignation, Warmbier was a Senior Project Engineer and had access to Nexteer's proprietary and confidential information and trade secrets. *Id*. at ¶¶59-61, 101.

- Scott Wendling ("Wendling") – Hired on May 5, 1995, and resigned on September 13, 2013. At the time of his resignation, Wendling was an Engineering Manager, Software and had access to Nexteer's proprietary and confidential information and trade secrets. *Id*. at ¶¶62-64, 101.

C. The Former Employees Sign Employment Agreements

On October 7, 2009, as a condition of continued employment and compensation, all ten of the Former Employees signed Employment Agreements with Steering Solutions Services Corporation. *Id*. at ¶¶36, 39, 42, 45, 48, 51, 54, 57, 60, and 63. Steering Solutions Services Corporation had its name changed to Nexteer on March 24, 2010. *Id*. at ¶117. Copies of the Employment Agreements are attached as Exhibit B. As part of their Employment Agreements, each of the Former Employees agreed to the following:

> I acknowledge that I am, or may become, privy to trade secrets or other confidential/proprietary information concerning Steering Solutions Services Corporation, its subsidiaries and/or affiliates, the disclosure of which will cause irreparable harm. I agree to not discuss or disclose to any person or entity any trade secret or confidential/proprietary information and, upon termination of employment, shall return such information to Employer. In addition, I agree that for a period of 12 months following voluntary termination of employment, I will not, directly or indirectly, knowingly induce any Steering Solutions Services Corporation employees to leave their employment for participation, directly or indirectly, with any existing or future business venture associated with me.
>
> I further agree that in consideration for compensation paid by Steering Solutions Services Corporation or one of its affiliates, all writings, designs, developments, works and inventions (collectively creations), that are conceived or made by me during the term of my employment and are related to Steering Solutions Services Corporation's business will be promptly disclosed to Steering Solutions Services Corporation by me and are the property of Steering Solutions Services Corporation or its designee. I hereby assign to Steering Solutions Services Corporation all such creations. I also agree that upon request by Steering Solutions Services Corporation any time during or after the period of employment, and at the expense of Steering Solutions Services Corporation, I will assist in filing or executing any documents that Steering Solutions Services Corporation may consider necessary or helpful for the application and prosecution of intellectual property registrations related to such creations. (Emphasis added). *See* Exhibit B.

Critically, the Employment Agreements do not contain an arbitration provision or any other alternative dispute resolution mechanism to resolve disputes over the terms or the enforcement of the Employment Agreements. Consequently, the parties contemplated that any unresolved disputes would be decided in court with concomitant discovery and other procedures. Additionally, the Employment Agreements do not include a choice of law provision and therefore Michigan law naturally would apply to disputes between Nexteer and these Saginaw-based employees.

D. The Former Employees Abruptly Resign And Almost Immediately Go To Work For Mando

Between September 4, 2013, and September 13, 2013, each of the ten Former Employees abruptly resigned from Nexteer and went to work for Mando. *See* Exhibit A, ¶99. All of the

resignations were effective immediately, without a notice period. *Id*. at ¶¶108-115. Following these resignations, another seven additional engineers resigned from Nexteer, presumably to work for Mando. *Id*. at ¶116.

Upon information and belief, the Former Employees and Mando have wrongfully misappropriated, used and disclosed confidential and proprietary information and trade secrets to Nexteer's competitive disadvantage in violation of MCL 445.1901, *et seq*., and/or are in the process of so doing. *Id*. at ¶206. For example, after the resignation of Dodak, three large file drawers, which were previously filled with documents regarding the projects Dodak worked on, were empty. *Id*. at ¶130. Additionally, Dodak's archive of stenographic notebooks (containing his to-do lists, observations, meeting notes, business plans, costs and pricing information) were missing from his office. *Id*. at ¶¶130, 127. Upon information and belief, Dodak took this information with him and has used, is using, or is preparing to use it in his employment with Mando. *Id*. at ¶131.

Additionally, upon information and belief, the Former Employees and Mando have collaborated to entice Nexteer employees to resign from Nexteer, accept employment with Mando at a much higher wage, and provide Mando with the necessary knowledge and information to either copy Nexteer products or manufacture products competitive with Nexteer. *Id*. at ¶120.

E. Nexteer's Relationship With Mando

While Nexteer and Mando are competitors, from April 2013 to August 2013, Nexteer and Mando actively considered the possibility of supplying components and subassemblies to one another for the purpose of jointly selling products to auto manufacturers. *Id*. at ¶134. Prior to beginning the consideration period, Nexteer required Mando to sign the NDA. *Id*. at ¶135. A copy of the NDA is attached as Exhibit C. The purpose of the NDA was to protect confidential

information exchanged between the parties as part of this process. The NDA required both parties to use all information to which they gained access solely for the purpose of considering the possibility of supplying components and subassemblies, and for no other purpose. *See* Exhibit A, ¶135.

The definition of "INFORMATION" protected under the NDA relates to technology and there is no mention of employee-related information. *See* Exhibit C. Specifically, "INFORMATION" is defined as follows:

> INFORMATION: All specimens, prototypes, drawings, documents, information and/or knowledge, technological, electronically or digital data, process or materials know-how as well as information on customers, suppliers and order volumes, which are made accessible to the receiving Partner or to which the receiving Partner gains otherwise access or which the receiving PARTNER has received since 1 June 2012 – whether in written, oral or any other form – are hereinafter referred to as "INFORMATION." *See* Exhibit C.

Additionally, there is no non-solicitation of employee clause in the NDA. There were only two signatories to the NDA – Nexteer and Mando.

The NDA provided the following regarding dispute resolution and the choice of law to be applied to same:

> This Non-disclosure Agreement shall be construed and the legal relations between the Partners shall be determined in accordance with the substantive laws of Switzerland, with the exclusion of its law of conflict of laws provisions. The United Nations Convention on Contracts for the International Sale of Goods (CISG) shall not be applicable.
>
> a. As set forth in the Memorandum of Understanding, any dispute, controversy or claim arising out of or in relation to this Nondisclosure Agreement, including the validity, invalidity, breach or termination thereof, shall be settled by arbitration in accordance with the Rules of Arbitration of the International Chamber of Commerce in force on the date when the Notice of Arbitration is submitted in accordance with these Rules.
>
> i. The place of the arbitration is Geneva, Switzerland.
> ii. The arbitration tribunal consists of three arbitrators.

iii. The arbitration proceedings shall be conducted in English.

b. The procedures specified herein shall be the sole and exclusive procedures for the resolution of disputes between the parties arising out of or relating to this Non-Disclosure Agreement; provided, however, that a Partner may seek a preliminary injunction or other preliminary judicial relief from a court with competent jurisdiction over the other Partner, if in its judgment such action is necessary to avoid irreparable harm or damages. Despite such action the Partners will continue to participate in good faith in the arbitration procedures specified above. (Emphasis added). *See* Exhibit C.

Of course, nothing in the NDA purported to govern the parties' relationship beyond the restrictions on disclosing the specific information defined and nothing purported to provide for a forum for trade secret misappropriation and other torts and violations of Michigan law. The NDA certainly did not discuss or reference Nexteer's agreements with its own employees. The potential collaboration between Nexteer and Mando ended in August 2013. *See* Exhibit A, ¶143.

III. PROCEDURAL HISTORY

A. Nexteer's Claims

On November 5, 2013, Nexteer commenced the present litigation alleging nine causes of action: 1) breach of contract against the Former Employees based upon the Employment Agreements; 2) tortious interference with business relationship/business expectations; 3) tortious interference with contract; 4) breach of fiduciary duty; 5) aiding and abetting/knowing participation in breach of fiduciary duty; 6) violation of the Michigan Uniform Trade Secret Act; 7) unjust enrichment/quantum meruit; 8) common law/statutory conversion; and 9) civil conspiracy. Nexteer sued the Former Employees as well as their new employer, Mando, and requested monetary damages as well as injunctive relief. None of the claims were based or dependent upon the NDA; however, the contractual claims and tortious interference actions were based upon the Employment Agreements.

B. The Parties Stipulate That The Arbitration Provisions Of The NDA Are Inapplicable

On November 22, 2013, the Circuit Court conducted a case management conference with the parties. The conference included discussions regarding the existence and applicability of any arbitration agreement to Nexteer's claims. As part of the Case Management Order ("CMO") entered by the Circuit Court on November 25, 2013, the parties agreed that while an agreement to arbitrate exists, it **"is not applicable."** A copy of the CMO is attached as Exhibit D. Prior to execution by the Circuit Court, each of the parties was provided with an opportunity to approve same (and did so). In fact, the CMO form was modified specifically to include a box that provided that the arbitration agreement was not applicable. *See* Circuit Court's Opinion dated July 10, 2014, p 12, fn. 4, attached as Exhibit E. In addition to addressing the issue of arbitration, the CMO also provided that the relief sought by Nexteer included both injunctive relief and monetary damages as well as that a settlement/trial management conference will be held prior to trial. *See* Exhibit D, pp 1, 3.

On December 6, 2013, Nexteer filed its First Amended Complaint. *See* Exhibit A. Mando filed its Answer to the First Amended Complaint on December 18, 2013. A copy of Mando's Answer is attached as Exhibit F. Consistent with its agreement in the CMO, at no point in Mando's Answer did it assert any right to arbitrate Nexteer's claims even after Nexteer sought a jury demand (further confirming that Nexteer was not just seeking a preliminary injunction).

C. Defendants Avail Themselves Of The Trial Court's Jurisdiction To Obtain Dismissal (In Whole Or In Part) Of Seven Out Of Nine Counts Of Nexteer's Complaint

On December 19, 2013, Defendants filed a motion for summary disposition and for protective order pursuant to MCR 2.116(C)(8), asking the Circuit Court to make legal determinations regarding Nexteer's claims. At no point in Defendants' motion for summary

disposition did they seek to compel arbitration of Nexteer's claims. On February 26, 2014, following oral argument, the Circuit Court granted in part and denied in part Mando's motion for summary disposition. A copy of the Circuit Court's Order is attached as Exhibit G. The Circuit Court dismissed, in whole or in part, Nexteer's claims for:

1. breach of fiduciary duty;
2. aiding and abetting;
3. unjust enrichment/quantum meruit;
4. common law/statutory conversion;
5. tortious interference with business relationship/business expectations;
6. tortious interference with contract; and
7. civil conspiracy.

On February 28, 2014, Defendants issued their first set of discovery requests to Nexteer requesting information and documents going to the overall merits of the case, and not limited to the narrow issue to which Defendants' now claim the court confined the case. On March 14, 2014, five of the Former Employees, C. Ross, K. Ross, Sebastian, Seeger and Dodak (the "Third-Party Plaintiffs"), filed counterclaims against Nexteer and two Nexteer executives claiming defamation and abuse of process directly related to Nexteer's allegations made in its First Amended Complaint.

On May 8, 2014, four months after it had obtained dismissal, or partial dismissal, of seven out of the nine counts in Nexteer's complaint, and six months after Nexteer filed its Complaint, Mando filed its motion for leave to file an amended answer and to compel arbitration of Nexteer's remaining claims on the basis of the NDA. Pursuant to the terms of the NDA, Mando asked the Circuit Court for international arbitration of all Nexteer's claims, including

those involving Saginaw employees based on an arbitration provision providing for a Swiss forum and law.

Following the oral argument on Mando's motion on June 3, 2014, and supplemental briefing by the parties, on July 10, 2014, the Circuit Court issued an Opinion granting Mando's motion and compelling arbitration as to all of Nexteer's remaining claims, even those claims involving the Former Employees who are not parties to the NDA. *See* Exhibit E. The Opinion makes clear that the Circuit Court based its ruling on a perceived lack of prejudice to Nexteer resulting from Mando's representations that the arbitration provisions of the NDA did not apply to Nexteer's claims and the decision to proceed with litigation for six months. Specifically, "[u]nder the circumstances, the court is not persuaded that Nexteer has suffered prejudice sufficient to overcome a presumption in favor of arbitration." *Id*. at p 12.

Additionally, the Opinion specifically rejected a number of "disingenuous" arguments that Defendants now rely on for their Application for Leave to Appeal:

> Mando, however, argues (1) its then-attorneys did not sufficiently understand, (2) the CMO was only preliminary, (3) the CMO did not indicate that arbitration was "waived", (4) the CMO expressly reserved any decision on ADR, and (5) the case was not then sufficiently developed to be able to see how the arbitration agreement applied. With due respect, the court finds the arguments disingenuous.
>
> First, Mando's Michigan attorneys are professional, respected, knowledgeable, experienced business/commercial trial attorneys. Moreover, these able local advocates have, from the beginning, been supplemented by Mando's Georgia-based corporate counsel (admitted to appear in this case by special Order) who is uniquely positioned to appreciate the client's history with Nexteer.
>
> Second, the CMO, quite intentionally, occurs in the early stages of litigation. However, as contemplated by MCR 2.401(B), it is intended to facilitate the long-term progress of the case. By opening the document with "the court being preliminarily advised of the following", the court did not make a "preliminary" Order but, rather, merely documented the parties "preliminary" statement of their claims, defenses, relief requested, and stipulated facts/documents, that then formed the foundation for the following court orders. Mando has demonstrated nothing in the course of the case management conference, and nothing in the

> resulting CMO, limiting its context or application. It is, for a reason, denominated a "case" management order.
>
> Third, the CMO did not indicate that arbitration "is waived" because waiver assumes an applicable arbitration agreement existed. Here, the parties agreed the arbitration agreement "exists" but that it "is not applicable". It would seem inconsistent to "waive" an agreement that is "not applicable".
>
> Fourth, although paragraph 18 of the CMO provides "This case is not presently being submitted to any form of ADR, but may be subsequently", the provision is prefaced by reference to MCR 2.410 which governs forms of alternative dispute resolution that proceed ancillary to pending litigation. This is readily distinguishable from an arbitration agreement that constitutes "disposition of the claim before commencement of the action", MCR 2.116(C)(7), that is commonly governed by MCR 3.602 and, moreover, here, is specifically addressed in ¶ 17 of the CMO.
>
> Finally, although the case management conference occurred prior to Nexteer's amended complaint, the new pleading did not materially change the legal landscape: i.e. the amended complaint contained the same nine causes of action and the abundant references to and attachments of the NDA (including its highlighted arbitration clause). (Emphasis added). *See* Exhibit E, pp 11-12.

On August 22, 2014, the Circuit Court entered the final Arbitration Order granting Mando's motion. A copy of the Arbitration Order is attached as Exhibit H. As part of the Order, the Circuit Court noted, "[t]o the extent Nexteer elects to commence arbitration proceedings, it shall not bring any claims that the Court dismissed pursuant to its February 26, 2014 Order re: Defendants' Motion to Dismiss…" *Id*. The Third-Party Plaintiffs initially stated that they "were eager to begin proceedings" in court, but then agreed to stay their claims.

On September 12, 2014, within 21 days of the Circuit Court's August 22, 2014, Order, Nexteer filed a Motion for Reconsideration of the Circuit Court's August 22, 2014, Order. Nexteer's Motion for Reconsideration addressed the Circuit Court's errors in compelling arbitration including its decision to first dismiss substantial portions of Nexteer's claims before compelling arbitration. On October 14, 2014, the Circuit Court denied Nexteer's Motion for Reconsideration. A copy of the Reconsideration Order is attached as Exhibit I.

On November 4, 2014, Nexteer filed its Application for Leave to Appeal with the Court of Appeals seeking reversal of the Circuit Court's decision that an express waiver requires prejudice and that Defendants' actions did not cause Nexteer sufficient prejudice to constitute an implied waiver. On March 23, 2015, the Court of Appeals entered an Order granting Nexteer's Application for Leave to Appeal.

D. The Court Of Appeals Reverses The Circuit Court's Order Compelling Arbitration

On February 11, 2016, following oral argument, the Court of Appeals issued a decision reversing the Circuit Court's dismissal of the case for arbitration and remanding to the Circuit Court. A copy of the decision is attached as Exhibit J. The Court of Appeals concluded that Mando waived its right to arbitration based on the CMO. Specifically,

> In this case, in November 2013, Mando stipulated that the arbitration provision in the nondisclosure agreement between Nexteer and Mando did not apply to the parties' controversy. The language of the stipulation showed knowledge of an arbitration provision and a clear expression of intent not to pursue arbitration. We conclude that the trial court erred when it determined that Mando's statement was not an express waiver because the stipulation directly indicated an intent not to pursue arbitration, which was the same right that Mando sought to assert six months later. *Id*. at 3.

The Court of Appeals also rejected Mando's (and the Circuit Court's) argument that a waiver of the right to arbitrate requires a showing of prejudice, regardless of whether the waiver is express or implied. While a party seeking to establish an implied waiver must show prejudice,

> where there is an express waiver, the party seeking to enforce the waiver need not show prejudice. See *Quality Prods*, 469 Mich at 378-379 (stating that discussion of implied waivers is unnecessary if an express waiver exists)." *Id*. at 4.

On March 23, 2016, Defendants filed their Application for Leave to Appeal to this Court.

IV. STANDARD OF REVIEW

Under Michigan law, the existence of a contract to arbitrate, and its enforceability, constitute judicial questions subject to *de novo* review. *See In re Nestorovski*, 283 Mich App 177,

197 (2009) (*citing Watts v Polaczyk*, 242 Mich App 600, 603 (2000)). Additionally, an appellate court reviews *de novo* the question of law whether the relevant circumstances establish a waiver of the right to arbitration. *See Madison Dist Pub Sch v Myers,* 247 Mich App 583, 588 (2001).

An application for leave to the Michigan Supreme Court must establish one of the grounds enumerated in MCR 7.305(B). The only two grounds relied on by Defendants in their Application for Leave to Appeal are: 1) the Court of Appeals' decision is allegedly clearly erroneous and will cause material injustice; and 2) the issue allegedly involves a legal principal of major significance to the state's jurisprudence. As discussed further below, neither ground supports granting Defendants' Application for Leave to Appeal.

V. ARGUMENT

A. The CMO Constituted A Stipulation And/Or An Express Waiver

1. Mando Knew About The Arbitration Provision And Unequivocally Agreed It Was Not Applicable

As noted by the Court of Appeals, "[a] waiver is an intentional relinquishment [or] abandonment of a known right." Exhibit J, p 3; *see also, Quality Prods & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 374 (2003). "A stipulation is an agreement, admission or concession made by the parties in a legal action with regard to a matter related to the case." *People v Metamora Water Serv, Inc,* 276 Mich App 376 (2007). The CMO specifically provides that "[a]n agreement to arbitrate this controversy" "exists." *See* Exhibit D. Clearly, Mando knew about the arbitration provision in the NDA, otherwise, there would be no reason to check the box that says "exists." After agreeing that an agreement to arbitrate exists, Mando (and all of the other parties including the Individual Defendants) agreed that the arbitration agreement "is not applicable." As the Circuit Court noted, the "is not applicable" box was added specifically for this case. *See* Exhibit E, p 12, fn. 4. There are no caveats contained in the CMO regarding the

inapplicability of the arbitration provision, or any indication that it could apply at a later time. Defendants are now attempting to rely on the very arbitration provision that they all agreed "is not applicable" to this controversy.

Defendants argue that no part of the CMO could be a stipulation because there is a provision on the first page providing as follows: "**Admissions/Stipulations (facts and/or documents):** nothing at this time." The stipulation at issue in this case is a legal stipulation, not a stipulation about when or if something happened (factual) or if a document is authentic (documentary). Here, the stipulation involves whether the arbitration provision in the NDA is applicable to Nexteer's claims against Mando and the Individual Defendants. As arbitration is undisputedly a matter of contract, the parties are free to stipulate whether an arbitration provision applies to a specific situation. Whether or not an arbitration provision applies to a specific controversy is a legal determination and thus, any stipulation regarding same would not be covered by the provision in the CMO relied on by Defendants. Unlike the issue in *In re Finlay Estate,* 430 Mich 590 (1988) regarding a stipulation as to whether the Probate Code applies after the effective date of the Revised Probate Code, the stipulation here involves a contractual right to arbitration. While the court decides the applicability of the law, the parties are free to decide whether their own contract applies. "A party may waive any of its contractual rights, including the right to arbitrate." *Joba Constr Co v Monroe County Drain Comm'r*, 150 Mich App 173, 178 (1986).

Regardless, whether the Court of Appeals called Defendants' actions a stipulation, affirmation, admission, agreement, or representation does not really matter. What is important is that Defendants knew that the arbitration agreement existed, represented to the Circuit Court and the parties that it did not apply, and this representation was made part of an order. Where a party

makes a representation to a court that is incorporated into a court order, the party is bound by the representation. *See Detroit Radiant Prods Co v BSH Home Appliances Corp*, 473 F3d 623, 629 (CA 6 2007)(court rejected party's theory based on its inconsistency with stipulated facts incorporated into the joint pretrial order).

Defendants further argue that because the NDA arbitration provision allows for a party to seek injunctive relief at the same time as proceeding with arbitration, they made a tactical decision to say that the arbitration provision was not applicable. If Defendants' claims were genuine, which the Circuit Court found otherwise, they could have easily asked the Circuit Court to check the box "is/will be the subject of a timely motion", to preserve their argument that the matter should be compelled into arbitration after preliminary proceedings. Defendants failed to check this box or request any caveats on their stipulation that the NDA's arbitration provision "is not applicable."

Additionally, even Mando's excuse for changing its position regarding the NDA's arbitration provision has been inconsistent. For example, during the June 3, 2014, hearing before the Circuit Court, Mando's New York counsel argued that Mando's Michigan counsel simply did not understand the NDA's arbitration provision when agreeing to the CMO. Specifically, "[b]ut – but that I don't think people understood that the arbitration clause was as far-reaching as my understanding of the law is that this kind of clause is." *See* Transcript for the June 3, 2014, Hearing, attached as Exhibit K, p 46. Mando's understanding of the arbitration was allegedly "more of a dawning realization over time." *Id*. at p 47. Mando's excuse was based on an apparent difference of opinion between Mando's Michigan counsel and New York counsel, not some tactical decision.

2. No Prejudice Is Required For An Express Waiver

The cases relied on by Defendants to claim that prejudice is required for a waiver deal with an implied waiver, not an express waiver. Defendants fail to cite a single case, either in Michigan or elsewhere to support its claim that an express waiver requires prejudice. In *Gilmore v Shearson/American Express, Inc*, 811 F2d 108, 112-13 (CA 2 1987)[1], the Second Circuit specifically addressed express waivers and held that prejudice is not required for an express waiver of arbitration. The defendant in *Gilmore* filed a motion to compel arbitration and then withdrew the motion. *Id*. at 110. The defendants "unequivocal withdrawal" of its motion to compel was an express waiver that did not require a showing of prejudice as required for waivers based on inaction (*i.e*., implied waivers). *Id*. at 112-13. *See also*, *Apollo Theater Found, Inc v W Int'l Syndication*, 2004 US Dist LEXIS 11110, *8 (SDNY June 21, 2004)(unpublished, attached as Exhibit L)("No showing of prejudice to the opposing party is necessary if a litigant has expressly waived its right to arbitration."); *American Home Assurance Co v Fremont Indem Co*, 1992 US Dist LEXIS 7512, *4-5 (SDNY May 29, 1992)(unpublished, attached as Exhibit M) ("Prejudice need not be shown where there is an express waiver of the right to arbitrate."). As noted in *Gilmore*, "[o]rdinarily, a party may not freely take inconsistent positions in a law suit and simply ignore the effect of a prior filed document." 811 F2d at 113. This is especially true where the party is using the inconsistent positions as a litigation "tactic." *Id*. at 113. In *Gilmore,* at least the party seeking to avoid waiver originally indicated that the arbitration agreement was applicable and arbitration should be compelled. Here, Defendants affirmed in a court order from the outset that arbitration was not applicable, even though an arbitration agreement existed, and then proceeded for several months in court consistent with that stipulation, obtaining the tactical

[1] The court in *Gilmore* specifically distinguished the decision in *Rush v. Oppenheimer & Co.,* 779 F.2d 885 (CA 2 1985), relied on by Defendants, as *Rush* involved an implied waiver, not an express waiver.

advantage of a motion to dismiss which would not be available at an International Arbitration, before seeking to avoid that waiver.

During the oral argument regarding Mando's Motion to Compel Arbitration, the Court repeatedly questioned the parties regarding their acknowledgment in the CMO that the arbitration provision in the NDA was not applicable and recognized the Defendants' agreement to the CMO as an affirmative waiver of the right to compel arbitration:

- "And don't I have then a, not just an acquiescence or an implied waiver, but don't I have an affirmative waiver of the arbitration provision, even if it applies?" *Id*. (Emphasis added) *See* Exhibit K, p 45.

- "But in any event, in this case where I have the affirmative acknowledgment that the arbitration clause does not apply is not insignificant to me. And I don't know that prejudice would matter in that case, the fact that you could restart into arbitration without too much difficulty. I'm not sure that would be controlling because that's not the type of waiver where is occasion just by delay. When you have an affirmative act of somebody saying, I agree I stipulate that the arbitration agreement does not apply here. And – and that's what we have,--" *Id.* at 69. (Emphasis added).

The Circuit Court (and Nexteer) should be able to rely on the agreements by Defendants without needing to show prejudice. If parties were not required to live up to their representations and agreements, the courts and the parties involved would end up spending unnecessary time and resources on issues that may not actually be at issue or fail to address the true matters at issue. Courts manage the cases before them based on the matters at issue. In order to properly manage those cases, parties cannot make representations or agreements with the court at the beginning of the case and then subsequently change their minds when it is to their tactical advantage.

As discussed further below, even if a showing of prejudice was necessary, Nexteer has been prejudiced by Mando's waiver of its alleged right to arbitrate. Defendants sought, and obtained, summary disposition (in whole or in part) of seven out of nine counts of Nexteer's

complaint before seeking to compel arbitration of the remaining claims. Michigan precedent is clear---Defendants cannot avail themselves of the early disposition tools available in the state courts for certain claims and then turn around and argue that the matter should be submitted to arbitration.

3. Defendants' Express Waiver Was Not Preliminary

At the time of the CMO, the Circuit Court had already denied Nexteer's request for a temporary restraining order. Additionally, from the beginning of the case, Nexteer sought monetary damages along with injunctive relief.[2] As the Circuit Court previously concluded, Defendants' argument that the CMO was "preliminary" is "disingenuous." *See* Exhibit E, p 11. Specifically, "Mando has demonstrated nothing in the course of the case management conference, and nothing in the resulting CMO, limiting its context or application." *Id*. For example, if they truly believed that arbitration was an important right and was applicable, given that Defendants knew that Nexteer was requesting monetary damages at the time they agreed to the CMO, they could have easily stated that arbitration was not applicable to the preliminary injunction but then governed the remainder of the dispute. Additionally, the NDA specifically provides that "the procedures specified herein shall be the sole and exclusive procedures for the resolution of disputes between the parties arising out of or relating to this Non-Disclosure Agreement," and that while the parties may seek a preliminary injunction through the courts to prevent irreparable harm, "the Partners will continue to participate in good faith in the arbitration procedures…." *See* Exhibit C. It is undisputed that no such arbitration procedures were initiated,

[2] Even in pleadings subsequent to the CMO, including in their Answer to the Complaint and their Motion to Dismiss, Defendants made it clear that this case was more than about a preliminary injunction and yet failed to raise their alleged right to arbitrate. For example, one of Defendants' affirmative defenses was that equitable relief was not appropriate because Nexteer could be "adequately compensated by damages." *See* Exhibit F, p 32. Additionally, in their Motion to Dismiss, Defendants included substantive analysis of the actual Employment Agreements at issue that went well beyond a preliminary injunction analysis.

or even suggested, at the time of the CMO (or at any time prior to or after Defendants' motion to compel arbitration).

Defendants' reliance on *In re Charter Behavioral Health Sys, LLC*, 277 BR 54 (Bankr D Del 2002) to argue against enforcement of the express waiver in the CMO is misplaced as the facts in that case are clearly distinguishable. The language from the scheduling order at issue in *Charter* provided that "the parties have determined after discussion that the matter cannot be resolved at this juncture by settlement, voluntary mediation or binding arbitration." (Emphasis added). While similar language is found in the CMO, ("This case is not presently being submitted to any form of ADR, but may be subsequently."), that is not the language relied on by the Court of Appeals. Instead, the Court of Appeals relied on Defendants' stipulation in the CMO that the arbitration provision "is not applicable." Absent from the language at issue in this case is any caveat such as "at this juncture." Additionally, while the court in *Charter* emphasized that the scheduling order at issue was "standardized," the Circuit Court here specifically noted that the CMO had to be modified specifically to include the "is not applicable" box. *See* Exhibit E, p 12, fn. 4.

Defendants' reliance on the *Report of the Caseflow Management Rules Committee*, 435 Mich 1210 (1990) to support the preliminary nature of the CMO pursuant to MCR 2.401 is also inapposite. For example, Defendants cite to language in the *Report of the Caseflow Management Rules Committee* that the court should "consider" instead of "determine" whether jurisdiction and venue are proper in the scheduling order. The *Report of the Caseflow Management Rules Committee* provides that "any action to be taken on such a determination would presumably require a hearing with appropriate notice and opportunity for the parties to be heard before disposition of the case on one of those bases." *Id*. at 1218. Defendants claim that this supports

the argument that the court is not to make final legal determinations in the CMO and thus, the CMO is only preliminary. Here, the parties stipulated that both jurisdiction and venue are "undisputed." Instead of having to wait to make such a determination or consider conflicting positions argued by the parties, the parties already stipulated to same, thus, demonstrating that the CMO in this case is not simply "preliminary." In Michigan, parties can waive challenges to personal jurisdiction and improper venue. *See Lease Acceptance Corp v Adams,* 272 Mich App 209, 219 (2006)(parties can consent to personal jurisdiction in Michigan); *People v Smogoleski,* 14 Mich App 695, 699 (1968)(parties may stipulate to waive improper venue).

While Defendants rely on certain language in the *Report of the Caseflow Management Rules Committee*, Defendants ignore the discussion of the importance of counsel for the parties being involved in the decision making regarding scheduling events and that the scheduling order should be issued after "meaningful consultation" with counsel. *Id*. at 1217. Here, the Circuit Court had "meaningful consultation" with the parties including a scheduling conference on November 22, 2013, and circulating the CMO to counsel via email for approval prior to issuing the CMO. As part of the meaningful consultation, all of the parties agreed that the arbitration provision in the NDA "is not applicable." Additionally, regardless of whether Defendants' agreement that the arbitration provision was not applicable was contained in the CMO or a separate stipulation made in open court, or even in a letter between the parties, the result would be the same. Defendants expressly waived their right to arbitration. Thus, Defendants' reliance on the *Report of the Caseflow Management Rules Committee* is misplaced.

Further, the *Report of the Caseflow Management Rules Committee* emphasized the flexibility given to judges regarding early scheduling conferences and orders noting, "there will doubtless be different uses made of the early scheduling conference in various courts." *Id*. at

1216. Here, the Circuit Court used the scheduling conference and the resulting CMO to determine that there was no dispute over jurisdiction and venue as well as that the NDA's arbitration provision "is not applicable" to Nexteer's claims.

4. The CMO Was Not An "Answer" To Which Leave To Amend Is "Freely Given"

Defendants argue that the CMO should not trump language in MCR 2.118(A)(2) which provides that leave to amend a pleading "shall be freely given when justice so requires." While this may be an argument to support Defendants' failure to include the arbitration provision in their answer as an affirmative defense (or in any of their responsive pleadings), it does nothing to excuse Defendants' express waiver of the arbitration provision in the CMO. The CMO is not a unilateral pleading such as an answer. Instead, as the Circuit Court noted in its July 10, 2014, Opinion, the CMO was "the result of telephone conference discussions with then-counsel of record, and was entered only after circulation to counsel for review and comment." Exhibit E, p 11. Mando and the Individual Defendants agreed that the arbitration provision was not applicable.

Unlike the potential applicable affirmative defenses available to a party, the forum in which the case will proceed is a threshold issue. A party should not be allowed to stipulate that one forum is inapplicable, use the Circuit Court's procedures to get what they want (*i.e.*, dismissal of the majority of Nexteer's claims), and then say that the parties are in the wrong forum. As noted above, even the Circuit Court was very troubled by Defendants' stipulation that the arbitration provision was inapplicable and then backtracking from that stipulation six months later. *See* Exhibit K, p 69.

5. The Michigan UCC Is Inapplicable To This Case

Defendants repeatedly quote from Article 2 of the Michigan Uniform Commercial Code ("UCC") in an attempt to support their ability to retract their waiver of the arbitration provision in the CMO. What Defendants fail to acknowledge is that neither the CMO nor the NDA are covered by Article 2 of the Michigan UCC. Article 2 applies to "transactions in goods." MCL 440.2102. The NDA dealt with the limitations on the use of information provided by the parties as they contemplated working together and the CMO dealt with the management of the litigation in the Circuit Court. Thus, the Michigan UCC fails to support Defendants' argument that they can simply retract their express waiver in the CMO.

Despite Defendants' efforts to refute the conclusion reached by the Court of Appeals, Defendants' Application for Leave to Appeal fails to even come close to establishing that the Court of Appeals committed "clear error" resulting in "material injustice." While Defendants may not like the decision, Defendants fail to meet their burden and thus, this Court should deny Defendants' application.

B. Defendants' Express Waiver Does Not Involve A Legal Principal Of Major Significance To The State's Jurisprudence

Contrary to Defendants' claims, whether or not the CMO constitutes an express waiver of the arbitration provision in the NDA does not involve a legal principal of major significance to the state's jurisprudence. As part of the litigation process, parties agree to case management orders or scheduling orders all the time. Enforcing Defendants' agreements made in the CMO is no more a major issue to the state's jurisprudence than enforcing any other agreement, admission, stipulation or court order. Requiring parties to live with the agreements they make, especially with the court during litigation, is nothing new. *See Balogh v Supreme Forest Woodmen Circle*, 284 Mich 700, 707 (1938)(court refused to rewrite the parties agreement to

create a liability where none existed regardless of the harsh result); *Detroit Radiant Prods,*, 473 F3d at 629 (party held to stipulated facts incorporated into the joint pretrial order).

C. Even If The Court Of Appeals Erred In Concluding The CMO Was An Express Waiver, The Court Of Appeals Reached The Correct Result

Even assuming, *arguendo*, that the Court of Appeals erred in reversing the Circuit Court based on the stipulation/express waiver in the CMO, the Circuit Court erred in compelling arbitration and thus, the Court of Appeals' reversal should be upheld on the alternative grounds as discussed further below including: 1) Defendants waived their right to arbitrate by seeking and obtaining dismissal of large portions of Nexteer's claims, causing Nexteer prejudice; 2) Defendants further waived their right to arbitrate by waiting six months to request arbitration and issuing discovery on the merits of Nexteer's claims, further prejudicing Nexteer; 3) Nexteer did not agree to arbitrate disputes with its former employees; 4) forcing arbitration here is inconsistent with the purpose of enforcing arbitration provisions; and 5) the Circuit Court improperly created its own arbitration agreement.[3]

1. Defendants Waived Arbitration By Seeking, And Obtaining, At Least Partial Summary Disposition Of Seven Out Of Nine Counts of Nexteer's Complaint

While the Court of Appeals did not reach the issue of whether Defendants' actions caused prejudice to Nexteer (as required for an implied waiver)[4], Defendants' actions clearly prejudiced Nexteer sufficiently to constitute an implied waiver. Notwithstanding Defendants' express acknowledgement that the arbitration provisions of the NDA do not apply, Defendants waived any right to arbitrate through taking actions inconsistent with such a right, resulting in prejudice to Nexteer. Critically, instead of timely moving to compel arbitration from the beginning of this

[3] To the extent this Court disagrees with the Court of Appeals' decision regarding express waiver as well as the alternative grounds for reversing the Circuit Court's order discussed below, this Court should remand the case back to the Court of Appeals to address the alternative grounds for reversing the Circuit Court's order compelling arbitration.

[4] The Court of Appeals also did not reach the issue of whether the parties' controversy was subject to arbitration.

case, Defendants elected to use the jurisdiction of the Circuit Court, and the procedures of the Michigan Court Rules, to obtain a decision on the merits and dismissal of huge portions of Nexteer's claims, which clearly prejudiced Nexteer.

In finding that Defendants did not waive arbitration by seeking dismissal of Nexteer's claims, the Circuit Court ignored clear Michigan precedent to the contrary. In *Capital Mort Corp v Coopers & Lybrand*, 142 Mich App 531, 533-34 (1985), the court held that "we believe [defendant] waived its right to arbitration when it filed its motion for summary judgment[5]. A motion for summary judgment indicates an election to proceed other than by arbitration." *Id.* at 535 (citation omitted). *See also*, *Myers*, 247 Mich App at 589 (parties have been held to waive the right to arbitration by filing a summary judgment motion).

In holding that Defendants did not waive arbitration by seeking and obtaining summary disposition, the Circuit Court relied on an unpublished Federal District Court decision, *Hofmeister Family Trust v FGH Industries, LLC*, No. 06-CV-13984-DT, 2007 US Dist LEXIS 97938 (ED Mich Oct 12, 2007). *See* Exhibit I, p 6. An unpublished District Court opinion is not binding precedent, even within the federal court system, and the decision in *Hofmeister* does not overrule the published decisions of the Michigan Court of Appeals in *Capital Mort Corp* and *Myers* that filing of a motion for summary disposition constitutes a waiver of the right to arbitrate.

Issues of precedential value aside, *Hofmeister* also is distinguishable and has little bearing on the facts of this case. The agreement at issue in *Hofmeister* expressly provided that "no party shall be deemed to have waived compliance by any other party with any provision of this Agreement unless such waiver is in writing…" and no such written waiver had been made.

[5] Whether Defendants' dispositive motion in this case was pursuant to MCR 2.116(C)(8) or (C)(10), the result was the same. Nexteer is precluded from re-litigating the dismissed claims based on the principals of res judicata.

Id. at *16-17. Here, there is no such restriction on waivers under the NDA and, moreover, there is a written waiver in the form of the CMO.

As the Arbitration Order from the Circuit Court provides that Nexteer may not pursue the dismissed claims in arbitration (effectively dismissing Nexteer's claims with prejudice), it is indisputable that Nexteer has been prejudiced by Defendants' actions. Defendants elected to avail themselves of the jurisdiction of the Circuit Court, and the procedures of the Michigan Court Rules, to obtain valuable relief to the detriment of Nexteer (*i.e.*, dismissal of substantial portions of Nexteer's claims). This clear prejudice, combined with Defendants' undisputed knowledge of the arbitration provision as well as their acts inconsistent with their arbitration right, constitutes a waiver and necessitates denial of Mando's motion to compel arbitration.

In addressing the prejudice argument on reconsideration, the Circuit Court noted that Nexteer did not suffer prejudice "by having its claims limited pre-arbitration to only legitimate ones." *See* Exhibit I, p 7. However, such reasoning ignores two critical issues. First, if the matter is subject to arbitration, the Circuit Court is not the proper decision maker to decide which of Nexteer's claims are legitimate. For example, under MCL 691.1687(4), courts are not permitted to refuse arbitration of claims on the basis that the claim is without merit or that grounds for the claim have not been established. Second, by seeking early dismissal of Nexteer's claims, Mando availed itself of procedures that are not available in arbitration under the rules of the International Chamber of Commerce. *See* Rules of Arbitration of the International Chamber of Commerce, attached as Exhibit N.[6] While the Circuit Court's decision should be reversed regardless of its handling of the dismissal issue, at a minimum, it should have reversed its dismissal of Nexteer's claims after concluding that arbitration was warranted. The

[6] Defendants also sought discovery through interrogatories and document requests, neither of which are specifically provided for under the ICC Rules.

Circuit Court failed to reinstate the dismissed claims even when provided with the opportunity to do so based on Nexteer's motion for reconsideration.

2. Defendants Also Acted Inconsistent With A Right To Arbitrate By Delaying For Nearly Six Months, And Engaging In Discovery, Before Asserting A Right To Arbitration

In addition to availing itself of the Circuit Court and Michigan Court Rules to obtain dismissal of Nexteer's claims, Defendants delayed seeking to compel arbitration by nearly six months. During that time, Nexteer expended tens of thousands of dollars in briefing and motions including, among other things, Defendants' motion for summary disposition which ultimately resulted in the dismissal, or partial dismissal, of seven out of the nine counts in Nexteer's complaint. *See* Register of Actions, attached as Exhibit O.

In addition, Defendants elected to avail themselves of the Michigan Court Rules providing for discovery by serving interrogatories and document requests. It is well recognized that taking advantage of court rules that provide for discovery is inconsistent with claiming a right to arbitrate and constitutes a waiver of any such right. *See Joba Contr Co*, 150 Mich App at 179; *Johnson Assocs Corp v HL Operating Corp*, 680 F3d 713 (CA 6 2012).

3. Nexteer Did Not Agree To Arbitrate Disputes With Its Former Employees

Defendants were right the first time when they agreed that the NDA's arbitration provisions were not applicable. At the crux of Nexteer's claims in this case is its employment relationships with the Former Employees, including the Employment Agreements and common law duties that governed those former employment relationships. As employees of Nexteer, the Former Employees had a special relationship with Nexteer, including access to Nexteer's confidential and proprietary information and trade secrets, as well as corresponding duties. At least half of the Former Employees held high-level positions with Nexteer.

It is important to understand that the most important players in this case are the Former Employees. Claims for trade secret misappropriation and contractual violations would exist regardless of the identity of the new employer. In fact, because the core of trade secret and non-solicitation, and non-compete cases are the actions of the employees, often the new employer is not a party to the lawsuit. However, while during oral argument the Circuit Court struggled with this issue (*see* Exhibit K, pp 11-12), it ultimately gave insufficient weight to the importance of the Former Employees and their contractual, statutory, and common law obligations to Nexteer. Specifically, the Circuit Court noted:

> Let's stop there for a second. Assuming I'm intrigued by using this arbitration clause in the NDA. I have individual defendants who are not signatories, who were employees of Nexteer, a signatory, in an agreement that talked about confidentiality between the corporations, not between the other corporation's employees. So you have, you have internally Nexteer employees theoretically running amuck. That's quite different than the two corporations saying, don't breach our confidences. Those employees then, it gets complicated because they have now countersued on something that I think we'd all agree is quite distinctly different, defamation and abuse of process, and then have and turn brought in new individual defendants. So when we talk about the possibility of some cases allude of bringing in non-signatories just because it's efficient. At some point doesn't it get so remote that you've got to sever it and say, those things are so distinct they're not even part of the tail of the dog? And if so, where does that line get drawn? *Id*.

It is undisputed that all of the Former Employees were employees of Nexteer in Saginaw, Michigan and signed Employment Agreements as part of their employment with Nexteer. It is also undisputed that all of the events relevant to this case occurred in Saginaw. None of the Employment Agreements provided for arbitration of any employment related claims or breaches of the Employment Agreements. Therefore, the parties contemplated that their disputes would be resolved in court, and potentially before a Saginaw jury, after discovery, motion practice and other standard procedures under the court rules. Neither Nexteer nor any of the Former Employees agreed to, much less ever imagined, that an NDA governed by Swiss law, providing

for a Swiss forum, and arbitration under the International Chamber of Commerce Rules, would apply to disputes under the Employment Agreements.

By pushing Nexteer's claims into arbitration, Nexteer's ability to discover the scope of the wrongdoing by the Individual Defendants will be curtailed. Specifically, under the Rules of Arbitration of the International Chamber of Commerce (which governs the parties arbitration under the NDA), depositions are rare and neither interrogatories nor document requests are specifically provided for under the Rules. Most international arbitration panels will not order depositions absent an agreement of the parties. *See* Born, International Commercial Arbitration, p 1902 (Kluwer Law International 2009) ("In cases where U.S. counsel are involved, parties sometimes voluntarily agree to reciprocal depositions…Absent such circumstances, the likelihood that an international tribunal will order a deposition, over one party's objection, is presently low.") This case cries out for discovery, including depositions, as the critical evidence is solely within the Defendants' possession. Only the Individual Defendants know exactly what they took and what they did with it.

"Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit." *J Brodie & Son, Inc v George A Fuller Co*, 16 Mich App 137, 145 (1969) (*quoting Atkinson v Sinclair Refining Co*, 370 US 238 (1962)); *see also McKain v Moore*, 172 Mich App 243, 253-54 (1988) (parties must have had a meeting of the minds in order for there to be an agreement to arbitrate); *see also, Beck v Park West Galleries, Inc*, 2016 Mich LEXIS 458, *9 (Mich Mar 24, 2016)(unpublished, attached as Exhibit P)("[a] party cannot be required to arbitrate an issue which he has not agreed to submit to arbitration"). Additionally, "Michigan law requires that separate contracts be treated separately." *Beck*, 2016 Mich LEXIS 458, *9; *see also, Mich Nat'l Bank v Martin*, 19 Mich App 458, 462

(1969). This Court should not force Nexteer to arbitrate claims that neither Nexteer nor the Former Employees ever contemplated, much less agreed, would be arbitrated.

The Circuit Court relied on *Javitch v First Union Securities, Inc*, 315 F3d 619, 628-629 (CA 6 2003) to conclude that the Former Employees (non-signatories to the NDA) could be bound by the arbitration provision of the NDA under "ordinary agency principals." However, the Circuit Court failed to explain what "agency principal" bound the non-signatories in this case. The Circuit Court appears to rely on an allegation by Nexteer regarding the Former Employees' conduct while employees of Nexteer. It is unclear how the Former Employees can be employees of Nexteer and at the same time agents of Mando sufficient to require the arbitration of the claims against the Former Employees. Regardless, the Circuit Court misses the point---while imposing the NDA on non-signatories is an important issue, the key fact is that the Former Employees and Nexteer had their own contracts that, unlike the NDA, are a basis for the claims (*e.g.*, without the contracts, Counts I and III cannot exist). The Circuit Court gives no weight to this paramount fact in its opinions.

Unlike the NDA, Nexteer's claims specifically rely on the Employment Agreements as well as information learned by the Former Employees during their employment with Nexteer. Without the NDA, Nexteer still has every single claim in its First Amended Complaint. Without the Employment Agreements and the common law duties owed by the former employees, none of Nexteer's claims would survive.

While courts favor arbitration in appropriate circumstances, forcing arbitration in this situation is simply going too far. The federal and state "policy in favor of arbitration is not an absolute one." *Albert H Higley Co v N/S Corp*, 445 F3d 861, 863 (CA 6 2006). As the Michigan Supreme Court recently concluded, "a general policy favoring arbitration cannot trump the actual

intent and agreement of the parties." *Beck*, 2016 Mich LEXIS 458, *13. Nor did any of the Employment Agreements provide for the law of Switzerland, or the Rules of Arbitration of the International Chamber of Commerce, to apply to the duties and obligations in the Employment Agreements. Of course, the employment relationships between Nexteer and the Former Employees had nothing to do with Switzerland. The Employment Agreements were signed in Michigan, performed in Michigan and neither the Former Employees nor Nexteer reside in nor are incorporated in Switzerland.

In short, to compel arbitration in this case, the Circuit Court had to ignore the Employment Agreements that are at the crux of Nexteer's claims, as well as give short-shrift to the relationship between Nexteer and its Former Employees, in order to give effect to an agreement designed for an entirely different purpose.

4. Forcing Arbitration Here Is Inconsistent With The Purpose Of Enforcing Arbitration Provisions

Ironically, in its contortions to force this case into arbitration, the Circuit Court's decision undermines the goals of arbitration. There will now be two separate actions involving the same facts – the counterclaims will proceed in the Circuit Court while the other claims will be litigated, at least initially, in arbitration. As Mando emphasized in its motion to compel arbitration: "[t]he purpose of arbitration "is the final disposition of differences between parties in a faster, less expensive, more expeditious manner than is available in ordinary court proceedings." *See* Mando's motion to compel arbitration, p 8, attached as Exhibit Q. (Emphasis added). "Segregating a single case into arbitrable and non-arbitrable disputes runs afoul of the Michigan's policy favoring arbitration as a means for resolving disputes. *Id*. at 13.

The Circuit Court's order ensures that the final disposition will not occur in arbitration nor will the proceedings be less expensive. The Circuit Court has also segregated claims it

considers arbitrable (*i.e.*, Nexteer's claims against Defendants) from claims it considers non-arbitrable (*i.e.*, the counterclaims). Based on Mando's own arguments to the Circuit Court, the Circuit Court's action "runs afoul" of the underlying bases for Michigan's public policy favoring arbitration and must be reversed.

5. The Circuit Court Improperly Created Its Own Arbitration Agreement

In order for the Circuit Court to conclude that Nexteer's claims against the Former Employees should be arbitrated in the Eastern District of Michigan, the Circuit Court had to ignore the Employment Agreements as well as most of the NDA's arbitration provision. As noted above, nothing in the Employment Agreements provide for arbitration. As for the NDA's arbitration provision, the Circuit Court completely ignored the governing law provided by the parties (*i.e.*, Switzerland) and changed the location of the arbitration from Geneva, Switzerland to Michigan. The Circuit Court acknowledged as much during oral argument:

> And I go to confess. I don't think that this is – this is an appropriate legal analysis, but it would give me some comfort. It would make me less uncomfortable to order to arbitration if I knew that there was some convenience in the forum, somewhere in the lower peninsula of Michigan whether it's Saginaw or Detroit. Because that's – that's where this cause of action has its nexus. But if the two of you can't consent, and it defaults to Geneva then maybe I don't find the arbitration clause that enforceable. Exhibit K, p 60.

To the extent the NDA applies at all (which it does not), the Circuit Court cannot re-write the arbitration provision to force the corporate parties as well as the Former Employees to arbitrate pursuant to an alleged agreement to which no party ever agreed or even contemplated. "[I]t has long been the law in this state that courts are not to rewrite the express terms of contracts." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 199-200 (2008). While re-writing the arbitration provision may have been an attempt by the Circuit Court to increase efficiency and costs savings, the fact that the counterclaims involving the same facts will be re-litigated before the Circuit Court actually works against efficiency and cost savings.

Additionally, the Circuit Court's procurement of the Former Employees' unilateral consent to arbitrate Nexteer's claims against them is insufficient to create a contract out of whole cloth. Of course, the Former Employees are in a completely different position now than when they entered into the Employment Agreements. Nexteer has never agreed to arbitrate its claims against the Former Employees. Allowing the Former Employees, whose defense is undoubtedly being provided by Mando and whose interests are therefore different from when they entered into the Employment Agreements they are trying to avoid, to unilaterally force Nexteer to arbitrate its claims based on the Former Employees' consent, is inconsistent with normal contract principals. *See City of Ferndale v Florence Cement Co*, 269 Mich App 452, 458 (2006) (relied on by the Circuit Court and holding that an agreement to arbitrate is a matter of contract). The Circuit Court fails to provide any legal support for the sufficiency of such consent to force Nexteer to arbitrate such claims.

VI. CONCLUSION

For the reasons stated above, Nexteer respectfully requests that this Court deny Defendants' Application for Leave to Appeal.

Respectfully submitted,

FOLEY & LARDNER LLP

/s/ John F. Birmingham, Jr.
John R. Trentacosta (P31856)
John F. Birmingham Jr. (P47150)
500 Woodward Avenue, Suite 2700
Detroit, MI 48226-3489
Telephone: (313) 234-7100
Facsimile: (313) 234-2800

Dated: April 20, 2016

PROOF OF SERVICE

The undersigned hereby certifies that on April 20, 2016, a copy of the foregoing Plaintiff-Appellee Nexteer Automotive Corporation's Answer in Opposition to Defendants-Appellants' Application for Leave to Appeal was served on all counsel of record, through the Court's electronic filing system and/or by first class mail, addressed as follows:

Shea Aiello & Doxsie PLLC
David J. Shea
26200 American Drive, Third Floor
Southfield, MI 48034

Giarmarco Mullins & Horton PC
Andrew T. Baran
William H. Horton
101 W. Big Beaver Road, Tenth Floor
Troy, MI 48084-5280

Braun Kendrick Finkbeiner PLC
C. Patrick Kaltenbach
4301 Fashion Square Blvd.
Saginaw, MI 48603
Telephone (989) 498-2100

Cohen & Gresser LLP
By: Alexandra S. Wald
Mark D. Spatz
Sang Min Lee
800 Third Ave., 21st Floor
New York, New York 10022

Plunkett Cooney, P.C.
Mary Massaron (P43885)
38505 Woodward Ave., Suite 2000
Bloomfield Hills, MI 48304
(313) 983-4801

/s/ John F. Birmingham, Jr.
John F. Birmingham, Jr.